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## Congressional Power to Regulate Supreme Court Appellate Jurisdiction under the Exceptions Clause: An Internal and External Examination

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CONGRESSIONAL POWER TO REGULATE  
SUPREME COURT APPELLATE JURISDICTION UNDER  
THE EXCEPTIONS CLAUSE:  
AN INTERNAL AND EXTERNAL EXAMINATION

MARTIN H. REDISH †

I. INTRODUCTION

IN A POLITICAL SENSE, at least, it seems to be a somewhat strange time for a wave of proposed legislation designed to curb the jurisdiction of the Supreme Court. Historically, such moves have occurred primarily when there existed a danger that the Court would overturn a congressional scheme of vital national import, thereby triggering a national crisis,<sup>1</sup> or when an increasingly activist and libertarian Supreme Court threatened to collide with a Congress concerned with preserving national security.<sup>2</sup> By contrast, today's Court is dominated by individuals appointed by Presidents concerned with reducing judicial activism,<sup>3</sup> and while those

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1. See, e.g., *Ex Parte McCordle*, 74 U.S. (7 Wall.) 506 (1868). In *McCordle* the Court upheld Congress' attempt to prevent Supreme Court consideration of the constitutionality of post-Civil War military Reconstruction in the South. For a discussion of *Ex Parte McCordle*, see notes 19-26, and accompanying text *infra*. See also C. FAIRMAN, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION, 1864-88*, pt. 1, at 449-59 (1971); Kutler, *Ex Parte McCordle: Judicial Impotency? The Supreme Court and Reconstruction Reconsidered*, 72 AM. HIS. REV. 835 (1967).

2. See, e.g., S. 2646, 85th Cong., 1st Sess. (1957), reprinted in S. REP. NO. 1586, 85th Cong., 2d Sess. (1958). Senate bill 2646 was introduced on July 26, 1957 by Senator William Jenner of Indiana. 103 CONG. REC. 12788 (1957). The Senate Judiciary Committee reported that the Jenner bill, as introduced, "embodied a single principle, namely, exercise by the Congress of its authority, under article III, section 2, clause 2 of the Constitution of the United States, to regulate the appellate jurisdiction of the United States Supreme Court, and to make exceptions to such jurisdiction." S. REP. NO. 1586, 85th Cong., 2d Sess. 1-2 (1958). The Jenner bill was introduced in response to a series of Supreme Court decisions, including *Watkins v. United States*, 354 U.S. 178 (1957), and *Pennsylvania v. Nelson*, 350 U.S. 497 (1956). 103 CONG. REC. A6352 (remarks of Sen. Jenner). The bill attempted to remove the Court's jurisdiction in cases questioning the validity of the practices of congressional committees and of governmental programs to remove security threats from governmental service. The bill was, however, passed only by the Senate, and never enacted. 104 CONG. REC. 19171, 17536, 18077, 19356 (1958).

3. I include in this category Chief Justice Burger and Justices Powell, Rehnquist, Blackmun, Stevens and O'Connor.

appointees have perhaps not always lived up to original expectations,<sup>4</sup> there is every reason to suppose that over the next three years the Court is likely to take on an even less activist appearance. Actually, all the talk in Congress and among academics about the need to curb a federal judiciary run wild makes me nostalgic for my days as a college and law student in the 1960's, when the Warren Court was realistically giving opponents of judicial activism something to worry about. To a believer in a judiciary which should be relatively active in the pursuit of individual liberty, the current Supreme Court pales by comparison.

Whatever the political motivation for such jurisdiction-curbing legislation, however, no one can doubt either the reality of the current moves to curb federal jurisdiction or the significant constitutional issues their enactment would raise. In previous writing, I have considered possible constitutional limitations on Congress' power to regulate the jurisdiction of the lower federal courts.<sup>5</sup> Here I wish to discuss the very different—though equally significant—constitutional issues surrounding congressional authority to regulate the appellate jurisdiction of the Supreme Court.

Unlike the lower federal courts, the Supreme Court's existence is mandated by article III of the Constitution.<sup>6</sup> However, it is only the Court's relatively limited original jurisdiction<sup>7</sup> that is unequivocally insulated from congressional regulation. The Court's appellate jurisdiction—by far its greater source of authority—is given, “with such Exceptions, and under such Regulations as the Congress shall make.”<sup>8</sup> A common sense interpretation of the constitutional language would seem to lead to the conclusion that Congress possesses fairly broad authority to curb Supreme Court appellate jurisdiction. Of course, a linguistic argument might be fashioned that the term “exceptions” implies that *some* jurisdiction is retained,

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4. Justice Blackmun, for example, was the author of the highly controversial decision in *Roe v. Wade*, 410 U.S. 113 (1973) (recognizing a constitutional right to an abortion).

5. Redish & Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 125 U. PA. L. REV. 45 (1975).

6. U.S. CONST. art. III, § 1. Article III, section 1 provides in part that “[t]he judicial Power of the United States, shall be vested in one supreme court, and in such inferior Courts as the Congress may from time to time ordain and establish,” *Id.* (emphasis added).

7. U.S. CONST. art. III, § 2, cl. 2. Article III, section 2 provides in part that “[i]n all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all other Cases before mentioned, the supreme Court shall have appellate Jurisdiction.” *Id.*

8. *Id.*

so Congress could not abrogate totally the Court's appellate jurisdiction. A more complex linguistic argument might even be fashioned that the term "exceptions" implies that Congress may not remove the major portion of the Court's appellate jurisdiction, since an "exception" must by definition be less expansive than the "rule" to which it is an exception. This argument, however, faces the difficulty that its acceptance would require deciding at exactly what point the "exception" has become so large that it has effectively superseded the "rule." In any event, it is clear that even if all the currently proposed jurisdiction-curbing legislation—dealing primarily with cases involving abortions,<sup>9</sup> school prayer<sup>10</sup> and busing to achieve racial integration<sup>11</sup>—were enacted, that tipping point would not have been reached.

Nevertheless, scholars have proposed various limitations on the scope of Congress' constitutional power under the exceptions clause. Some of these limitations are said to derive from within the clause itself—limitations which may be deemed "internal."<sup>12</sup> Others, which may be characterized as "external" constraints, are said to flow from other constitutional provisions. I intend here to consider the arguments proposed in support of these asserted limitations, both internal and external. Ultimately, I conclude that there exist no real internal limitations on Congress' power under the exceptions clause.<sup>13</sup> The external limitations, on the other hand, present

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9. See H.R. 867, 97th Cong., 1st Sess. (1981). House bill 867, which was introduced by Representative Crane on January 16, 1981, provides in part that "the Supreme Court shall not have jurisdiction to review, by appeal, writ of certiorari, or otherwise, any case arising out of any State statute, ordinance, rule, regulation, or any part thereof, . . . which relates to abortion." *Id.* § 1. Another section of the bill revokes the district court's jurisdiction over abortion cases "which the Supreme Court does not have jurisdiction to review." *Id.* § 2.

10. See H.R. 72, 97th Cong., 1st Sess. (1981). House bill 72, which was introduced by Representative Ashbrook on January 5, 1982, provides in part that "the Supreme Court shall not have jurisdiction to review, by appeal, writ of certiorari, or otherwise, any case arising out of any State statute, ordinance, rule, regulation, or any part thereof, . . . which relates to voluntary prayers in public schools and public buildings." *Id.* § 1. Another section of the bill revokes the district court's jurisdiction over public prayer cases "which the Supreme Court does not have jurisdiction to review." *Id.* § 2.

11. See H.R. 340, 97th Cong., 1st Sess. (1981); H.R. 761, 97th Cong., 1st Sess. (1981); H.R. 869, 97th Cong., 1st Sess. (1981). Each of these bills, introduced separately by Representatives Holt, McDonald and Crane in January 1981, would revoke the jurisdiction of the Supreme Court and the district courts in cases "which have the effect of requiring any individual to attend any particular school." H.R. 761, 97th Cong., 1st Sess. (1981).

12. See notes 27-57 and accompanying text *infra*.

13. See note 57 and accompanying text *infra*.

more complex issues of constitutional law, and it is conceivable (though by no means clear) that, at least in certain situations, they will exercise a restraint on Congress' power.<sup>14</sup> Even if such limits are found to exist, however, there will remain substantial opportunity for Congress to curb Supreme Court appellate jurisdiction.<sup>15</sup>

But while Congress' power in this area ultimately proves to be broad, it is important to understand the impact that the exercise of this power to curb jurisdiction would have. Not all those to have considered the issue have done so. It has been suggested, for example, that jurisdictional limitation may be viewed as a preferable alternative to the amendment process as a means of circumventing a Supreme Court constitutional decision.<sup>16</sup> Such thinking dangerously misconceives both the effect of a jurisdictional limitation and the role of the Supreme Court within the constitutional scheme.<sup>17</sup> Thus, whatever the outer reaches of Congress' power under the exceptions clause, if the true impact of such legislation were universally understood, it is quite possible that no curbs on the substantive exercise of Supreme Court jurisdiction would ever be enacted.

## II. THE CASE LAW BACKGROUND

The natural starting point for a consideration of Congress' power under the exceptions clause is a discussion of the relevant case law concerning past congressional efforts to curb Supreme Court jurisdiction. Unfortunately, such an examination proves to be far from definitive, and ultimately aids the inquiry very little. In part for this reason and in part because others have already done an excellent job analyzing the case law background,<sup>18</sup> I will confine my discussion of the case law to the bare essentials.

The case to which every court or commentator must first turn is the Supreme Court's decision in *Ex Parte McCordle*.<sup>19</sup> There the Court refused to decide an appeal from a lower court's denial of a writ of habeas corpus challenging the constitutionality of the

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14. See notes 58-116 and accompanying text *infra*.

15. It should be emphasized that, while concluding that in certain cases congressional authority to limit Supreme Court jurisdiction exists, this author does not believe that the exercise of such authority is either wise or advisable. See text and accompanying notes 117 & 118 *infra*.

16. See Rice, *Congress and the Supreme Court's Jurisdiction*, 27 VILL. L. REV. 959, 959-60 (1982).

17. See notes 106-16 and accompanying text *infra*.

18. See, e.g., Van Alstyne, *A Critical Guide to Ex Parte McCordle*, 15 ARIZ. L. REV. 229 (1973).

19. 74 U.S. (7 Wall.) 506 (1868).

congressional program of post-Civil War Reconstruction.<sup>20</sup> Following argument of the case before the Court, Congress repealed the statute,<sup>21</sup> which had been enacted one year earlier and authorized the Court to give appellate review to habeas decisions from the lower federal courts. The Court dismissed the case for lack of jurisdiction, and in so doing made statements endorsing a virtually unlimited scope for the exceptions clause.<sup>22</sup> Thus, read for "all it might be worth," *McCardle* may be taken to stand as precedent for broad congressional power to curb Supreme Court appellate jurisdiction.

But it is now commonplace to note that Congress' repeal of jurisdiction had no effect on an alternative method of obtaining Supreme Court review of habeas corpus denials provided by the Judiciary Act of 1789.<sup>23</sup> This point did not go unnoticed by

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20. *Id.* at 515. *McCardle*, alleging unlawful restraint of his liberty by military force, filed a petition in the Circuit Court for the Southern District of Mississippi for a writ of habeas corpus. *Id.* at 507. *McCardle*, a newspaper editor, was being held in custody by military authority for trial before a military commission upon charges of libel. *Id.* at 508. The district court denied *McCardle*'s petition for a writ of habeas corpus, and he was returned to military custody. *Id.* *McCardle* then brought an appeal to the Supreme Court under the Act of Feb. 5, 1867, ch. 28 § 1, 14 Stat. 385. 74 U.S. (7 Wall.) at 518.

21. 74 U.S. (7 Wall.) at 517-18. After *McCardle*'s appeal had been docketed by the Supreme Court, the government filed a motion to dismiss for want of jurisdiction which was denied by the Supreme Court. *Id.* at 508. The Supreme Court subsequently heard oral arguments on the merits of *McCardle*'s appeal on four dates commencing on March 2, 1868. *Id.* After the Court had taken the case under advisement, but before a conference upon the merits was held by the Justices, Congress, by a bill hurried to enactment on March 27, 1868, repealed the habeas corpus statute of February 5, 1867, which formed the basis of *McCardle*'s appeal insofar as it permitted an appeal to the Supreme Court. *Id.* at 509.

22. *Id.* at 513-14. The *McCardle* Court stated that Congress' affirmative description of the Court's appellate jurisdiction "has been understood to imply a negation of the exercise of such appellate power as is not comprehended within [the affirmative description]." *Id.* at 513, quoting *Durousseau v. United States*, 10 U.S. (6 Cranch) 307, 314 (1810). The Court noted that "[w]ithout jurisdiction the court cannot proceed at all in any cause," and that "[w]e are not at liberty to inquire into the motives of the legislature." 74 U.S. (7 Wall.) at 514.

23. Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1364 (1953). The Judiciary Act of 1789 contained the earliest provision for federal habeas corpus, permitting the federal courts, including the Supreme Court, to issue the writ but only on behalf of prisoners held "in custody, under or by colour of the authority of the United States . . ." Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 81. Nearly fifty years after the Judiciary Act of 1789, Congress expanded the scope of the federal habeas corpus remedy to permit federal courts to issue writs for persons confined under the authority of a state, but only insofar as such persons were detained "for any act done, or omitted to be done, in pursuance of a law of the United States, or any order, process, or decree, of any judge or court thereof. . . ." Act of March 2, 1833, ch. 57, § 7,

the *McCardle* Court itself<sup>24</sup> and was made more forcefully by the Court later that year in *Ex parte Yerger*.<sup>25</sup> Hence, despite its fairly sweeping dictum, *McCardle* cannot really be taken to stand as a dispositive precedent on the question of congressional power to excise from the Court's appellate jurisdiction an area of substantive review. While at various times the Court has made similarly sweeping comments about the breadth of congressional power,<sup>26</sup> all of those comments came as dicta. Therefore, if the issue is ever to be reconsidered by the courts, precedent will prove to be of relatively limited value in deciphering the meaning of the

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4 Stat. 634. The severe limitation of this arrangement was that the federal habeas corpus remedy was available only for persons detained by state or local authority. In order to correct this deficiency, on February 5, 1867, Congress extended to the federal judiciary the authority to issue writs of habeas corpus in any case, state as well as federal, "where any person may be restrained of his or her liberty in violation of the Constitution, or of any treaty or law of the United States." Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385. The Act of March 27, 1868, which was at issue in *McCardle*, specifically repealed so much of the 1867 Act "as authorized an appeal from a judgement of the Circuit Court to the Supreme Court of the United States. . .," but otherwise left the scope of the Supreme Court's prior habeas corpus jurisdiction undisturbed. Act of March 27, 1868, ch. 34, § 2, 15 Stat. 44.

24. 74 U.S. (7 Wall.) at 515. At the close of its opinion, the *McCardle* Court observed that:

Counsel seem to have supposed, if effect be given to the repealing [Act of March 27, 1868] in question, that the whole appellate power of the court, in cases, of *habeas corpus*, is denied. But this is an error. The Act [of March 27, 1868] does not except from that jurisdiction any cases but appeals from Circuit Courts under the act of 1867. It does not affect the jurisdiction [of the Supreme Court] which was previously exercised.

*Id.*

25. 75 U.S. (8 Wall.) 85 (1868). The *Yerger* Court unanimously held that *McCardle* was limited to habeas actions under the Act of Feb. 5, 1867 and the decision did not take away the appellate jurisdiction of the Court to grant habeas corpus, under the Constitution and the Judiciary Act. *Id.* at 105. The *Yerger* Court first reasoned "that none of the acts prior to 1867, authorizing [the Supreme Court to] exercise appellate jurisdiction by means of the writ of *habeas corpus*, were repealed by [Congress] act of [1868]." *Id.* at 106. The Court then went on to conclude "that the repealing section of the act of 1868 is limited in terms, and must be limited in effect to the appellate jurisdiction authorized by the act of 1867." *Id.*

26. See, e.g., *Barry v. Mercein*, 46 U.S. (5 How.) 103, 119 (1847). In *Barry*, the Court considered whether it had jurisdiction over the petitioner's appeal from a circuit court judgment refusing to grant a writ of habeas corpus. *Id.* at 119. The *Barry* Court commenced its discussion by stating that "[b]y the Constitution of the United States, the Supreme Court possesses no appellate power in any case, unless conferred upon it by act of Congress, nor can it, when conferred be exercised in any other form, or by any other mode of proceeding than that which the law prescribes." *Id.* The Court ultimately concluded that Congress had not granted it appellate authority over the case before it, and dismissed the case for want of jurisdiction. *Id.* at 120.

exceptions clause. More fruitful, perhaps, would be an analysis of the theories of leading commentators about the clause's meaning, and it is to such an analysis that I now turn.

### III. AN INTERNAL EXAMINATION: THE MEANING OF THE EXCEPTIONS CLAUSE

#### A. *The "Essential Functions" Thesis*

Several respected commentators have urged that while Congress possesses some power under the exceptions clause, "the exceptions must not be such as will destroy the essential role of the Supreme Court in the constitutional plan."<sup>27</sup> When Professor Henry Hart made that statement in 1953, he provided absolutely no indication of exactly what Supreme Court functions were to be deemed "essential," how anyone was to answer that question, or on what basis he found such a limitation in the Constitution. In light of this, Professor Hart's comment could at best be characterized as conclusory and at worst as simply off-hand. But picking up where Professor Hart left off, Professor Leonard Ratner some seven years later elaborated upon the "essential functions" thesis.<sup>28</sup> The first task Professor Ratner attempted was to define the meaning of the term, "essential functions." Such functions, he said, were "(1) to provide a tribunal for the ultimate resolution of inconsistent or conflicting interpretations of federal law by state and federal courts, and (2) to provide a tribunal for maintaining the supremacy of federal law when it conflicts with state law or is challenged by state authority."<sup>29</sup>

Few would deny that the functions mentioned by Professor Ratner are among the most significant functions performed by the Supreme Court. But that, of course, is not the point. Both Professors Hart and Ratner have read into seemingly unambiguous constitutional language a principle that undeniably does not appear anywhere on the face of the document.<sup>30</sup> A strong argument could

27. Hart, *supra* note 23, at 1365. In Professor Hart's "dialogue", "Q" responds to the assertion of "A"'s "essential functions" thesis by stating: "The measure seems pretty indeterminate to me." *Id.* "A"'s retort is that "whatever the difficulties of the test, they are less, are they not, than the difficulties of reading the Constitution as authorizing its own destruction?" *Id.* Hart never explains, however, exactly why rejection of the "essential functions" thesis would necessarily lead to the Constitution's destruction.

28. Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157 (1960).

29. *Id.* at 161.

30. Professor Ratner urges what is in effect, an amendment of the constitutional language by academic decree. He argues that "[r]easonably interpreted



be fashioned that such tinkering with explicit constitutional language is impermissible, regardless of whatever policy considerations or historical evidence can be marshalled in support. As to the relevance of policy considerations, it could be argued that while broadly phrased constitutional provisions may be adapted to meet changing values and social conditions, the rational limits imposed by the constitutional language must be observed, lest we effectively discard the carefully structured constitutional scheme. For as I once stated in a slightly different context:

[I]f recognized, such a power [to disregard the outer limits of constitutional language] knows no logical bounds: if the Court's constitutional pronouncements are not required to have at least an arguable basis in the document's language, the Court's decisions inescapably become mere fiat, insulated from reasoned debate other than in the purely legislative sense of debating the normative wisdom of whatever "constitutional" rule the Court is considering devising.<sup>31</sup>

Thus, while I might well agree, as a policy matter, that Congress should not possess the power to tamper with performance of the Supreme Court's role, if I can find no constitutional basis for erecting such a limitation, I am powerless to alter the situation. To quote Professor Hart, who perhaps should have better heeded his own implied warning, "whose Constitution are you talking about—Utopia's or ours?"<sup>32</sup>

As to the relevance of historical evidence concerning the intent of the Framers, a strong argument could be fashioned that such evidence is irrelevant in interpreting a relatively unambiguous constitutional provision, such as the exceptions clause.<sup>33</sup> For it was the constitutional language, not the background debate, that was enacted into law. While such evidence might well be relevant to interpretation of language whose meaning is unclear, it is arguably not useful in the admittedly rare case where no ambiguity can be

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the [exceptions] clause means '[w]ith such exceptions and under such regulations as Congress may make, not inconsistent with the essential functions of the Supreme Court under this Constitution.'" *Id.* at 172 (citations omitted).

31. Redish, *Due Process, Federalism and Personal Jurisdiction: A Theoretical Evaluation*, 75 NW. U.L. REV. 1112, 1130 (1981).

32. Hart, *supra* note 23, at 1372.

33. As a point of clarification, I should emphasize that I do not intend to suggest that there exist absolutely no ambiguities about the meaning of the various words of the exceptions clause. The clause could not be more clear, however, that Congress' power is not to be limited by some unstated notion of "essential functions."

found, and there can be no doubt that the exceptions clause contains no reference to "essential functions."

In any event, if historical evidence is ever to be allowed to alter our interpretation of unambiguous constitutional language, it must be considerably more overwhelming than the history to which Professor Ratner points in support of his "essential functions" thesis. At best, his evidence is speculative and at worst, it is simply useless.

After sifting through Professor Ratner's extensive historical arguments,<sup>34</sup> I can find two basic factors upon which he relies to demonstrate the Framers' belief in the "essential functions" thesis. First, he notes that:

Proposals that the Supreme Court, acting with the Executive, be given power to veto congressional legislation and that Congress be given power to veto state legislation, though vigorously urged, were ultimately defeated in large part by the force of the argument that Supreme Court review of cases involving the constitutionality of either state or federal statutes would constitute a sufficient check upon the legislative power.<sup>35</sup>

Ratner further notes "the Convention's purpose to make the Supreme Court the principal instrumentality for implementing the supremacy clause."<sup>36</sup> But of course, none of this relates directly to the Framers' understanding of the exceptions clause itself. If Professor Ratner intends to establish that the Framers intended the explicit language of that clause to be modified by a non-existent qualifier,<sup>37</sup> surely he must provide more than general evidence concerning the Framers' vision of the Supreme Court's role. Every bit of debate to which he refers must be modified by recognition of the express wording ultimately chosen by the Framers. In any event, *vis a vis* the states, at least, Professor Ratner's evidence

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34. Professor Ratner primarily relies upon early Supreme Court decisions which interpret article III to provide an historical foundation for his essential functions thesis. For example, Ratner cites *Ableman v. Booth*, 62 U.S. (21 How.) 506 (1858); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821); and *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1806), to establish that an "indispensable function" of the Supreme Court is "to resolve conflicting interpretations of the federal law and to maintain the supremacy of that law when it . . . is challenged by state authority." Ratner, *supra* note 28, at 166-67.

Relatively little of Professor Ratner's evidence for his essential functions thesis deals with the Framers' intended meaning of the exceptions clause.

35. Ratner, *supra* note 28, at 162 (citations omitted).

36. *Id.* at 165 (citation omitted).

37. See note 30 and accompanying text *supra*.

establishes only that the Framers deemed it necessary for Congress to have the *authority* to employ the Supreme Court as a check on state decisions affecting federal law. Nothing that was said, either directly or impliedly, deems Congress *obligated* to use the Court in this manner. For if the policy-making branches of the federal government—Congress and the Executive—conclude that whatever interpretations of federal law given by the state courts are acceptable, there will be no need for Supreme Court policing of the state courts to assure compliance with federal supremacy; by definition, whatever the state courts hold will be consistent with federal policy. As in the case of federal preemption of state law, the fact that Congress *may* choose to preempt an area does not mean that it cannot instead decide to authorize state legislation. What is important for purposes of federalism is that Congress have the *power* to check the states, not that such a check be *required* of Congress.

Furthermore, Professor Ratner's contention that the Framers assumed the availability of Supreme Court review to invalidate congressional legislation, even if accurate, is irrelevant to the essential functions which Ratner posits—policing of the states and providing federal uniformity. But more importantly, the specific quotations to which Ratner refers<sup>38</sup> speak only of the authority of the judicial branch or of "the Judges" to review congressional legislation. There is nothing in these statements which implies that the power must necessarily be exercised by the Supreme Court.<sup>39</sup>

Professor Ratner's second piece of supporting historical evidence concerns a rejected change in wording of the exceptions clause. He acknowledges that "[t]he Committee on Detail [which prepared the language of the clause] kept no record of its proceedings, and there is no evidence apart from the draft itself as to how the language originated."<sup>40</sup> However, he notes that following the Committee's report to the Convention an amendment was proposed to change the language of the exceptions clause to read: "In all the other cases before mentioned the judicial power shall be exercised in such manner as the legislature shall direct."<sup>41</sup> The amendment was defeated, leading Ratner to conclude that

[h]ad the Convention desired to give Congress [plenary control over Supreme Court appellate jurisdiction], the rea-

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38. Ratner, *supra* note 28, at 162 n.25.

39. See notes 59-62 and accompanying text *infra*.

40. Ratner, *supra* note 28, at 172 n.69.

41. *Id.* at 172, *citing*, 1 M. FARRAND, RECORDS OF THE CONSTITUTIONAL CONVENTION 431 (1911).

sonable course would have been to adopt the unequivocal language of the amendment in place of the more ambiguous phrasing of the Committee's draft. The defeat of the amendment thus may reasonably be construed as a rejection by the Convention of plenary congressional control over the appellate jurisdiction of the Court and as indicating that the purpose of the clause was to authorize exceptions and regulations by Congress not incompatible with the essential constitutional functions of the Court.<sup>42</sup>

The leaps of logic and faith in this reasoning boggle the mind. First, by his own admission Ratner has no historical material to work with other than the bare fact of the proposed amendment's existence and its defeat. Thus, if he is properly to draw any irrefutable conclusions from the amendment's rejection they must be ones that inherently flow from the ultimate decision to reject. Yet there are numerous possible interpretations that might be given to explain this act, other than the one Ratner suggests. Most probable is that the Framers chose to leave the "inertia" of jurisdiction with the Supreme Court, requiring Congress to take affirmative steps (i.e. make exceptions) to limit it, rather than require Congress to set out the Court's jurisdiction in the first place and thus making exceptions merely by a failure to delineate, which would have been the result of the amendment. Ironically, the Supreme Court itself has all but accomplished the apparent goal of the rejected amendment by holding that Congress' failure to grant appellate jurisdiction to the Court constitutes the making of an exception.<sup>43</sup> But for the moment that is beside the point. The immediate issue is the meaning to be attributed to the rejection of the proposed amendment, and whether or not the Supreme Court has correctly interpreted the Framers' intent in the matter, it appears that this explanation is at least as probable as any other, including Professor Ratner's, for the amendment's rejection. Indeed, for all we know, the amendment may have been rejected because the Framers simply preferred the style of the Committee on Detail, or because they believed there was no need to adopt the amendment since the Committee's proposal effectively did the same thing.<sup>44</sup>

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42. Ratner, *supra* note 28, at 173.

43. See *Durousseau v. United States*, 10 U.S. (6 Cranch) 307, 313 (1810).

44. It might have been more probative—though clearly not dispositive of Professor Ratner's position—had the Committee on Detail originally proposed wording similar to that of the amendment, and the Convention had

But let us assume for the moment that we can somehow be sure that in rejecting the proposed amendment the Framers intended to make Congress' power to regulate Supreme Court appellate jurisdiction more limited than would have been the case if the amendment had been adopted. How in Heaven's name do we get from that conclusion—itself one in no way logically supportable—to the conclusion that the Framers therefore intended to adopt the "essential functions" thesis as a limitation on Congress' power? If they had intended to do that, why did they not simply say so?

I do not mean by this analysis to question the thoroughness of Professor Ratner's historical research. Quite the contrary; his research was obviously done painstakingly and with great sophistication. But that, I am afraid, is exactly the point. Even the most careful historical research by an eminent scholar could not produce anything approaching hard evidence to support the "essential functions" thesis. This demonstrates all too clearly, therefore that the "essential functions" thesis is little more than constitutional wishful thinking, and it is thus not surprising that leading commentators have long rejected it.<sup>45</sup>

A final point should be made about the "essential functions" thesis. Professor Ratner's version of the thesis, it should be recalled, does not posit that one of those essential functions is to serve as a constitutional check on the majoritarian branches of the federal government. It has been suggested, however, that reading the exceptions clause to mean what it says is somehow inconsistent with the spirit of our constitutional scheme in general and with the concept of judicial review in particular. Professor Berger, for example, has argued that

the Founders were deeply concerned with, and in no little part designed judicial review as a restraint on, *Congressional* excesses. If the Court was intended to curb Congressional excesses in appropriately presented "cases or controversies," and if an attempt to exercise that power might be blocked by Congress as a judicial "excess," then the Convention was aimlessly going in circles.<sup>46</sup>

But even if it is assumed that the Framers contemplated judicial review as a central part of the constitutional scheme—a fact which instead accepted an amendment proposing the language that is now the exceptions clause.

45. See, e.g., Van Alstyne, *supra* note 18, at 257; Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1005-06 (1965).

46. R. BERGER, *CONGRESS V. THE SUPREME COURT* 268 (1969) (footnote omitted).

is by no means certain, especially in light of their failure to mention the concept in the document itself<sup>47</sup>—it is incorrect to confuse *judicial* review with *Supreme Court* review. Certainly the lower federal courts, if their jurisdiction is left intact, may review the constitutionality of congressional action. And even if Congress exercises its widely accepted power to limit the jurisdiction of those courts, the state courts—obligated under the supremacy clause<sup>48</sup> to uphold the Constitution—remain open to review legislative constitutionality. Vis a vis Congress, at least, state courts remain as independent as article III federal judges, because Congress has no power to regulate either their salary or tenure.<sup>49</sup> As Professor Hart told us a number of years ago, “[i]n the scheme of the Constitution, [the state courts] are the primary guarantors of constitutional rights, and in many cases they may be the ultimate ones.”<sup>50</sup> Thus, there

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47. I do not mean to imply that I do not today find the concept of judicial review is today not of central importance to the constitutional scheme. The issue, rather, is whether the Framers so believed, and the evidence on the issue appears mixed.

48. U.S. CONST. art. VI, cl. 2: The supremacy clause provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

*Id.*

49. See Redish, *Constitutional Limitations on Congressional Power to Control Federal Jurisdiction: A Reaction to Professor Sager*, 77 NW. U. L. REV. —, — (1982). Of course, state courts are not necessarily independent of their own legislatures. See *id.* However, at the time of the Constitution's adoption, there were no significant constitutional limitations on the power of the states over individuals.

50. Hart, *supra* note 23, at 1401. See also Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 627 (1981) (“We must never forget that under our constitutional structure it is the state, and not the lower federal, courts that constitute our ultimate guarantee that a usurping legislature and executive cannot strip us of our constitutional rights.”)

I have long argued that, as a practical matter, state courts can no longer be deemed fungible with the lower federal courts as interpreters of federal law and as enforcers of federal rights. See, e.g., Redish, *The Doctrine of Younger v. Harris: Deference In Search of a Rationale*, 63 CORNELL L. REV. 463 (1978). However, I have been unable to accept the theory recently developed by Professor Sager that state courts are constitutionally inadequate under the language and history of article III. Redish, *supra* note 49, at —. See Sager, *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17 (1981).

Contrary to Professor Sager's contention, the language of the salary and tenure provision of article III does not require the availability of an article III forum in all cases asserting a constitutional right. The language can easily be read to mean simply that *if and when* Congress employs the federal

is no reason to believe that the exercise of congressional power under the exceptions clause would necessarily violate the precept that the judicial branch may invalidate congressional legislation on grounds of unconstitutionality.<sup>51</sup>

### B. *The Limitation-As-to-Fact Theory*

There exists an alternative internal method of confining Congress' power over Supreme Court appellate jurisdiction which at least has the advantage of purporting to interpret the actual language of the exceptions clause. The argument, developed over the years by commentators,<sup>52</sup> focuses on the phrase immediately preceding the exceptions clause. The complete constitutional language reads as follows: "In all other cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."<sup>53</sup> It has been suggested that the words of the exceptions clause do not modify the words, "appellate Jurisdiction," but rather modify only the word "Fact". So read, the constitutional language authorizes Congress to make exceptions only to the Supreme Court's power to review factual determinations. If accepted, of course, the theory would effectively preclude Congress from limiting the Court's jurisdiction in the manner proposed by the currently pending legislation. But while evidence does exist to support the contention that the Framers were concerned with Supreme

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courts as interpreters of federal law, it must provide them the independence assured by the salary and tenure provision. Moreover, nothing in the language of that provision in any way limits its reach to cases involving assertion of a constitutional right. Nor does Professor Sager meet his historical burden of proof in attempting to demonstrate that the Framers intended the result he suggests. In my response to Professor Sager, I do argue that modern theories of due process—rather than historical arguments based on article III—may lead to the conclusion that, in reviewing assertions of constitutional right against state or local (as opposed to federal) officers or legislative action, the state court must be formally independent of the state or local government. See note 61, *infra*. But at most, this conclusion would dictate the availability of a lower federal court. It would never require the availability of the Supreme Court.

51. This point is of great relevance to the issue of the impact of legislation curbing Supreme Court appellate jurisdiction. See notes 106-16 and accompanying text *infra*.

52. See, e.g., R. BERGER, *supra* note 46, at 285-96; Merry, *Scope of the Supreme Court's Appellate Jurisdiction: Historical Basis*, 47 MINN. L. REV. 53, 54 & n.6 (1962).

53. U.S. CONST. art. III, § 2.

Court review of findings of fact in the lower courts,<sup>54</sup> the theory is faced with insurmountable linguistic and historical obstacles.

The linguistic obstacle comes down to not much more than the location of a comma, but that difference in location appears to make a significant difference in terms of meaning. The language of article III, it should be recalled, is that "the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions and under such Regulations as the Congress shall make." Note that there are commas both before and after the phrase, "both as to Law and Fact." So structured, it is undeniable that the phrase beginning with, "with such Exceptions" modifies the words, "appellate Jurisdiction," rather than the word, "Fact." If the Framers had placed the comma after the word "Law," the meaning could conceivably have been different, since the "Exceptions" phrase would arguably then be confined to the word "Fact." Even if this change had been made, however, use of the word "both" would still have clouded the Framers' meaning. For it is unlikely they would have used the "both" preceding "as to Law and Fact" if they had chosen to place a comma after "Law." Linguistically, therefore, there exists no rational basis for construing the wording of article III to mean that Congress' authority under the exceptions clause was limited to Supreme Court review of factual determinations.

Perhaps more important is the fact that limits imposed upon Supreme Court appellate jurisdiction by the Judiciary Act of 1789<sup>55</sup>—limits that apparently went unchallenged—imposed restrictions which went far beyond matters of factual review.<sup>56</sup> Thus, this relatively contemporaneous evidence tends to establish that the Framers intended no such limitation. Finally, while Supreme Court precedent, such as *McCardle*,<sup>57</sup> may not be dispositive as to the validity of the "essential functions" thesis, it clearly disposes of

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54. See sources cited in R. BERGER, *supra* note 46, at 286-88; Merry, *supra* note 52, at 57-59; Van Alstyne, *supra* note 18, at 261. See also C. WARREN, *THE MAKING OF THE CONSTITUTION* 542-43 (1967); U.S. CONST. art. III, § 2.

55. Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 84-85 (1789).

56. *Id.* For example, Congress excluded from the Court's jurisdiction certain cases involving amounts less than \$2,000. *Id.* According to Professor Van Alstyne, the historical references traditionally cited to justify the review-as-to-fact interpretation of the exceptions clause "scarcely go so far as to suggest that that is *all* the clause would reach." Van Alstyne, *supra* note 18, at 261 n.99.

See also J. GOEBEL, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801*, 247 (1971); Strong, *Rx for a Nagging Constitutional Headache*, 8 SAN DIEGO L. REV. 246, 251-54 (1971).

57. See notes 19-26 and accompanying text *supra*.



the review-as-to-fact theory, since the limitation on the Court's appellate jurisdiction upheld there was in no way confined to review of factual determinations.

There is, then, no internal method of construing the exceptions clause to mean anything other than what it says. If a way is to be found to narrow Congress' broad power, it must be from a constitutional source external to the exceptions clause itself.

#### IV. AN EXTERNAL EXAMINATION: DUE PROCESS, EQUAL PROTECTION, AND SEPARATION-OF-POWERS CONSIDERATIONS

##### A. *Due Process*

Any provision of the Constitution, of course, may be modified by means of the amendment process. Thus, if an existing amendment is found to be inconsistent with a provision within the body of the Constitution, the former must logically take precedence. No more helpful than the internal methods in the attempt to confine the reach of the exceptions clause, however, is the fifth amendment's due process clause.<sup>58</sup> While I firmly believe that that clause requires an independent judicial forum for the ultimate adjudication of claims of constitutional right,<sup>59</sup> as already noted,<sup>60</sup> that requirement may be met by either the lower federal or state courts,<sup>61</sup> and therefore does not require the assertion of Supreme Court jurisdiction. Since the Supreme Court itself has unequivocally held that due process does not require the provision of *any* level of appellate review,<sup>62</sup> there can be no doubt that mere removal of the Supreme

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58. U.S. CONST. amend. V.

59. Redish & Woods, *supra* note 5, at 76-81.

60. See notes 48-51 and accompanying text *supra*.

61. Note once again the possible difficulty for state court review of state legislative and executive action in those states whose judges do not retain the protections of independence provided by federal article III judges. The Supreme Court has held that while due process requires an "independent" forum for adjudication of constitutional rights, it does not dictate use of article III protections. See, e.g., *Palmore v. United States*, 411 U.S. 389, 402 (1973). I have recently questioned the wisdom of this conclusion. Redish, *supra* note 49. However, even if my view that state judges lacking the equivalent of article III protections did not provide an independent forum for due process purposes when reviewing assertions of constitutional right against state executive or legislative action were accepted, it would not necessarily follow that due process would require the exercise of the Supreme Court's appellate jurisdiction. For due process could be met either by leaving open the lower federal courts or by requiring that state judges receive such protections.

62. See *Lindsey v. Normet*, 405 U.S. 56, 64 (1972); *Griffin v. Illinois*, 351 U.S. 12, 18 (1956); *McKane v. Durston*, 153 U.S. 684, 687 (1894).

Court's appellate jurisdiction would fail to present any due process problems. A greater hope for an effective external restraint on Congress' power to remove cases from the Supreme Court's appellate jurisdiction, then, is equal protection.<sup>63</sup>

### B. *Equal Protection*

While the fifth amendment by its terms imposes no requirement of equal protection on the federal government,<sup>64</sup> the Supreme Court has construed that amendment's due process clause to impose such an obligation.<sup>65</sup> Thus, if Congress attempted to employ its authority under the exceptions clause to deny blacks or aliens a right of Supreme Court appellate review, such legislation would unquestionably be unconstitutional. The issue remaining for consideration, however, is whether the equal protection requirement can be used to strike down any other (and more likely) exercises of power under the exceptions clause.

A number of years ago, Professor Van Alstyne suggested that equal protection may in fact serve as a significant limitation on Congress' authority.<sup>66</sup> He reasoned in the following manner:

Where the class of excluded cases involves the exercise of "fundamental rights," the appropriate standard of judicial review is the more taxing one which denies any presumption of constitutionality and requires that the government justify the exceptional treatment of the class by demonstrating an imperative connection between the basis for singling out that class and a highly compelling, as well as limited governmental interest.<sup>67</sup>

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63. There does exist one other constitutional doctrine which limits Congress' power under the exceptions clause. It is separation of powers. See notes 101-05 and accompanying text *infra*.

64. The fourteenth amendment's equal protection clause, of course, is limited to state action.

65. *Bolling v. Sharpe*, 347 U.S. 497 (1954). In *Bolling*, a companion case to *Brown v. Board of Educ.*, 347 U.S. 483 (1954), the Supreme Court stated: "The Fifth Amendment . . . does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The "equal protection of the laws" is a more explicit safeguard of prohibited unfairness than "due process of law," . . . but, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process."

*Id.* at 499 (footnote omitted).

66. Van Alstyne, *supra* note 18, at 263-67.

67. *Id.* at 264.

Van Alstyne therefore concluded that

[t]he use by Congress of the exceptions power to single out a class of cases involving fundamental rights, withdrawn from the Supreme Court's appellate jurisdiction only from dissatisfaction with the Court's exercise of its power of substantive constitutional review in respect to such cases, may, ironically, today be subject to fifth amendment challenge.<sup>68</sup>

Van Alstyne is not certain how the "compelling interest" requirement, imposed to measure the validity of classifications of so-called "discrete and insular minorities"<sup>69</sup> or in the use of fundamental rights,<sup>70</sup> would apply to the exercise of congressional authority under the exceptions clause.<sup>71</sup> That question however, must be faced only after one has first concluded that the highly demanding "compelling interest" standard<sup>72</sup> of equal protection review—or indeed, any equal protection review at all—is relevant. I have serious doubts that the equal protection limitation extends as far as Professor Van Alstyne suggests. The reason for these doubts is that, to borrow a phrase from the National Rifle Association, rights don't have rights; *people* have rights. In other words, if all Congress has done is to remove a class of cases involving assertion of a particular right from the Supreme Court's appellate jurisdiction, and has done so for everyone, there would not even appear to exist a *prima facie* equal protection problem, assuming no clear, disproportionate impact and no demonstration of an ultimate legislative purpose to single out a particular group for negative treatment. True, in such an event Congress would be classifying on the basis of rights, and possibly fundamental rights. But a first amendment right of free speech, for example, has no abstract complaint because it is singled out for exclusion from appellate jurisdiction while cases asserting the fourth amendment right against unreasonable search and seizure still can be heard by

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68. *Id.* at 265.

69. The language was first employed by Justice Stone in his famous footnote in *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). For cases holding that strict scrutiny applies to discrimination against racial minorities, see *Loving v. Virginia*, 388 U.S. 1, 10 (1967); *McLaughlin v. Florida*, 379 U.S. 184, 191-92 (1964).

70. See, e.g., *Shapiro v. Thompson*, 394 U.S. 618 (1969).

71. Van Alstyne, *supra* note 18, at 264.

72. See, e.g., *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972).

the Supreme Court.<sup>73</sup> The right itself, as I have already noted, has no right to equal treatment vis a vis other rights.<sup>74</sup>

Of course, there always exists the possibility that limitation of jurisdiction only as to some rights will have a greater impact on some individuals than others. But as long as the jurisdictional exclusion is framed in general terms (for example if it provides that no free speech cases may be heard by the Court, rather than that no free speech claims by Communists may be heard),<sup>75</sup> the differing impact is likely to be so diffuse that it cannot be thought to affect disproportionately a particular, well-defined group.<sup>76</sup> And even if it did, under the principle of *Washington v. Davis*,<sup>77</sup> an equal protection challenge to such an exclusion would have to demonstrate a motive to reach that group.

More serious equal protection problems may develop, however, where Congress has removed from the Court's appellate jurisdiction cases involving assertion of a right that can only be made—either as a matter of law or of practicality—by a well-defined group. If that grouping is one that traditionally triggers a high standard of equal protection review—such as blacks<sup>78</sup> or aliens<sup>79</sup>—then it is

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73. It should be emphasized that in such a situation, limitations of Supreme Court appellate jurisdiction would not constitute a direct violation of the first amendment itself, as long as some independent forum existed to protect that right.

74. See, e.g., *Police Dept. of Chicago v. Mosley*, 408 U.S. 92 (1972). In *Mosley*, the court held that an ordinance prohibiting picketing near a school, with an exception for labor picketing, violated the equal protection clause. *Id.* at 102. However, if the city had amended the ordinance to impose the ban on labor picketing as well, no one could have raised an equal protection challenge on the grounds that first amendment rights were limited while fourth amendment rights were not.

75. Note that the drawing of such distinctions may result in great emphasis being placed on the specific wording in the jurisdiction-curbing legislation.

76. Cf. *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 19 (1973) ("The case comes to us with no definitive description of the classifying facts or delineation of the disfavored class.")

77. 426 U.S. 229 (1976). *Washington* was an action challenging police department recruiting procedures as racially discriminating. *Id.* at 232. While concluding that the due process clause of the fifth amendment contains an equal protection component prohibiting the Government from invidious discrimination, the *Washington* Court held that it does not follow that a law or other official act is unconstitutional solely because it has racially disproportionate impact, regardless of whether it reflects a racially discriminatory purpose. *Id.* at 239-45.

78. See *McLaughlin v. Florida*, 379 U.S. 184, 191-92 (1964) (state statute prohibiting habitual occupation of a room at night by unmarried interracial couples held unconstitutional); *Anderson v. Martin*, 375 U.S. 399, 403-04 (1964) (election statute that promotes racial discrimination held unconstitutional).

79. See *Sugarman v. Dougall*, 413 U.S. 634, 642-43 (1973) (state statutory prohibition against employment of aliens in state competitive civil service

conceivable that such congressional action would present serious equal protection difficulties.

Confusion in the analysis exists, however, because, if artfully drafted, legislation pursuant to the exceptions clause need not on its face refer to the affected minority. Thus, while an act explicitly removing Supreme Court jurisdiction over assertions of equal protection violation by blacks would undoubtedly trigger the so-called "strict scrutiny" traditionally associated with racial classifications,<sup>80</sup> an act which merely took away the Court's jurisdiction to hear complaints of racial segregation could arguably be characterized as facially "neutral." The same could perhaps be said of the currently proposed legislation to curb the Court's jurisdiction to use busing to end school segregation. Of course, when facially neutral legislation has a clear disparate racial impact—as both the hypothetical and the actually proposed legislation would have—the Court under *Washington v. Davis*<sup>81</sup> would both permit<sup>82</sup> and require a showing of legislative motivation to reach the affected minority before an equal protection violation could be established. While demonstration of actual legislative motivation involves substantial difficulties,<sup>83</sup> it is highly likely that such a showing could be made with relative ease for jurisdiction-curbing legislation as to both racial segregation cases in general and busing cases in particular.

A strong argument could be fashioned, however, that a showing of motivation under *Washington* is not required for legislation which unambiguously impacts more heavily on blacks, even though perhaps in a technical sense facially neutral. I believe, for example, that legislation removing medicaid benefits for the treatment of sickle-cell anemia or prohibiting the wearing of afro hairdos calls for use of strict scrutiny, even though such laws are technically neutral. In *Washington*, neither the disparate impact nor the

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held invalid); *Graham v. Richardson*, 403 U.S. 365, 376 (1971) (state statutes denying welfare benefits to resident aliens held unconstitutional).

80. See notes 76 & 77 and accompanying text *supra*.

81. 426 U.S. 229 (1976).

82. Prior to *Washington*, the Court had indicated that investigation of legislative motivation behind laws facially neutral but having a racially disparate impact was not permitted. See *Palmer v. Thompson*, 403 U.S. 217, 224 (1971). The *Washington* Court, however, retreated slightly from his position, stating that "[t]o the extent that *Palmer* suggests a generally applicable proposition that legislative purpose is irrelevant in constitutional adjudication, our prior cases . . . are to the contrary." 426 U.S. at 244 n.11.

83. Even those who advocate its relevance to constitutional interpretation acknowledge the difficulties inherent in the investigation of legislative motivation. See Brest, *Palmer v. Thompson: An Approach to Unconstitutional Legislative Motivation*, 1971 SUP. CT. REV. 95, 133-34 (1971).

racially-based motivation of the challenged practice—use of certain tests to choose police officers—was nearly so clear as in either these hypotheticals or the previously-discussed proposed jurisdiction-curbing legislation.<sup>84</sup> All the Court established in that decision was, in the Court's words, that "[d]isproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination. . . ." <sup>85</sup>

Thus, it appears likely that a law removing from Supreme Court appellate jurisdiction cases involving assertion of a right asserted almost exclusively by blacks, even though the law did not on its face refer to blacks, should trigger the "strict scrutiny" approach used by the Court for racial discrimination. Whether Congress could establish the requisite "compelling interest" to justify such a discrimination, however, is uncertain. Traditionally, use of strict scrutiny has all but automatically meant invalidation of the classification, despite the implication of the test's language that establishment of a justification was at least conceivable.<sup>86</sup> However, the use of Congress' power under the exceptions clause in such a situation is unprecedented and in many ways unique. It therefore cannot be firmly predicted that, even under a "strict scrutiny" standard, such legislation will be held unconstitutional. For the exercise of Congress' express power to curb the Supreme Court's substantive appellate jurisdiction may itself be found to be a "compelling interest." On the other hand, the simple exercise of an express power would not normally in itself be considered a "compelling interest," since Congress cannot act unless ultimately justified by one of its powers. The fifth amendment, of course, is designed to serve as a limitation on the exercise of those powers. The most likely conclusion, then, is that legislation excluding from the Supreme Court's appellate jurisdiction the power to review cases asserting a right totally or predominantly asserted by blacks or aliens would violate equal protection, despite the exceptions clause and despite the absence of a constitutional right to Supreme Court appellate review in the abstract.<sup>87</sup>

More confusing are the equal protection implications for legislation curbing the Court's appellate jurisdiction to hear abortion

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84. See notes 9-11 and accompanying text *supra*.

85. 426 U.S. at 242.

86. According to Professor Gunther, use of this standard has traditionally been "strict in theory and fatal in fact." Gunther, *The Supreme Court, 1971 Term—Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

87. See notes 73 & 74 and accompanying text *supra*.

cases. It might appear, upon initial examination, that the analysis should be similar to the one employed for legislation affecting rights asserted by blacks. After all, while an act curbing the opportunity to enforce a right to an abortion may not on its face discriminate against women, it is a law of nature that such legislation can affect only women. Although sexually-based classifications have never received the strict scrutiny given to racial and alienage classifications,<sup>88</sup> the Court has generally provided a standard of review far tougher than "mere rationality" to sex-based discrimination.<sup>89</sup> Yet for some reason not entirely clear to me, the Court has consistently refused to consider regulations affecting the right to an abortion—or virtually any facially neutral law having an inescapable and negative impact on women—as sexual discrimination.

A classic illustration is *Geduldig v. Aiello*.<sup>90</sup> There the Court upheld against an equal protection attack a California disability insurance system for private employees disabled by an injury or illness not covered by workmen's compensation, even though the plan did not provide benefits for normal pregnancies. The Court treated the classification as a simple resource allocation decision.<sup>91</sup> At no point did the Court acknowledge that a discrimination against pregnancy benefits invariably impacted only upon women.<sup>92</sup>

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88. Compare *Schlesinger v. Ballard*, 419 U.S. 498 (1975) (military policy which granted women officers a significantly greater number of years than male officers to obtain promotions before mandatory discharge upheld against claim of gender discrimination) with *McLaughlin v. Florida*, 379 U.S. 184 (1964) (state statute prohibiting habitual occupation of a room at night by unmarried interracial couples held unconstitutional).

89. See *Craig v. Boren*, 429 U.S. 190 (1976); *Reed v. Reed*, 404 U.S. 71 (1971).

90. 417 U.S. 484 (1974).

91. *Id.* at 494. The *Geduldig* Court concluded that California's decision not to insure the risk of disability resulting from normal pregnancy did not constitute an invidious discrimination, stating that:

Although California has created a program to insure most risks of employment disability, it has not chosen to insure all such risks, and its decision is reflected in the level of annual contributions exacted from participating employees. This Court has held that, consistently with the Equal Protection Clause, a State 'may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind . . . . The legislature may select one phase of one field and apply a remedy there, neglecting the others . . . .' Particularly with respect to social welfare programs, so long as the line drawn by the State is rationally supportable, the courts will not interpose their judgment as to the appropriate stopping point.

*Id.*, quoting *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1955) (citations omitted).

92. 417 U.S. at 496. Indeed, the *Geduldig* Court dismissed this issue, stating that "[t]here is no evidence in the record that the selection of the risks insured by the program worked to discriminate against any definable

The same has been true in the abortion area. In *Harris v. McRae*,<sup>93</sup> the Court upheld congressional legislation limiting the use of federal funds to reimburse the cost of abortions, even those deemed medically necessary, under the medicaid program. After initially concluding that the constitutional right to an abortion was in no way undermined by the government's refusal to provide funding,<sup>94</sup> the Court rejected an equal protection challenge.<sup>95</sup> The Court found no suspect classification present, relying on its earlier decision in *Maher v. Roe*,<sup>96</sup> where it had stated:

An indigent woman desiring an abortion does not come within the limited category of disadvantaged classes so recognized by our cases. Nor does the fact that the impact of the regulation falls upon those who cannot pay lead to a different conclusion. In a sense, every denial of welfare to an indigent creates a wealth classification as compared to nonindigents who are able to pay for the desired goods or services. But this Court has never held that financial need alone identifies a suspect class for purposes of equal protection analysis.<sup>97</sup>

In both *Maher* and *Harris*, then, the Court viewed the classification as one based on indigency, which does not receive strict scrutiny.<sup>98</sup> While *Harris* has been severely criticized on a number of grounds,<sup>99</sup> one obvious basis of criticism is that the decision fails to recognize that the classification was inescapably one based on sex, as well as indigency.<sup>100</sup> Whether correct or not, however, the Court's un-

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group or class . . . ." *Id.* See also *Personnel Adm'r v. Feeney*, 442 U.S. 256 (1979), where the Court applied *Washington's* motivation requirement to uphold Massachusetts' veterans' preference law which had a disproportionate impact upon women. *Id.* at 272. At least in *Feeney*, however, the Court was willing to recognize the law's ultimate impact on women, despite its facial neutrality. *Id.* at 274.

93. 448 U.S. at 297 (1980).

94. *Id.* at 312-18.

95. *Id.*

96. 432 U.S. 464 (1977).

97. 448 U.S. at 323, quoting *Maher v. Roe*, 432 U.S. 464, 470-71 (citations omitted).

98. See *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973) (school financing system which was not shown to discriminate against any definable class of "poor" people does not constitute a violation of equal protection).

99. See, e.g., Bennett, *Abortion and Judicial Review: Of Burdens and Benefits, Hard Cases and Some Bad Law*, 75 NW. U.L. REV. 978 (1981); Perry, *Why the Supreme Court Was Plainly Wrong in the Hyde Amendment Case: A Brief Comment on Harris v. McRae*, 32 STAN. L. REV. 1075 (1980).

100. See Brest, *The Substance of Process*, 42 OHIO ST. L.J. 131, 139 n.41 (1981).



wavering approach to facially neutral classifications having an inescapable and negative impact on women makes fairly clear that legislation curbing Supreme Court appellate jurisdiction to review cases in which a right to an abortion is asserted would not be invalidated on equal protection grounds.

Even more certain is that the presently proposed legislation to restrict the Court's jurisdiction over the use of prayer in public schools would not face a strong equal protection challenge. For here, unlike the previously discussed situations, the affected right is not always or primarily asserted by a discrete group whose presence traditionally triggers a high standard of equal protection review. The same could probably be said of most conceivable attempts to curb the Court's appellate jurisdiction. Thus, while the possible impact of the equal protection guarantee on Congress' power under the exceptions clause should not be overlooked, it appears that at most that impact would be limited primarily to removal of jurisdiction in cases asserting rights of racial equality.

### C. Separation of Powers

A final external constitutional limitation on Congress' power is the implicit doctrine of separation of powers. Although Congress may possess authority to remove completely from the Supreme Court's appellate jurisdiction substantive areas of law, it may not instead provide the Court with jurisdiction but direct it to act in an unconstitutional manner or require that the Court interpret the Constitution in a particular way. As Professor Hart stated, "if Congress directs an article III court to decide a case, I can easily read into article III a limitation on the power of Congress to tell the court *how* to decide it."<sup>101</sup> The Court itself adopted such a position in its well-known decision in *United States v. Klein*.<sup>102</sup>

When applied to currently proposed jurisdiction-curbing legislation, the separation-of-powers limitation appears arguably rele-

101. See Hart, *supra* note 23, at 1373.

102. 80 U.S. (13 Wall.) 128 (1871). Congress clearly has the authority to fix rules of procedure which govern article III courts and to define the substantive laws which article III courts must enforce. However, the *Klein* case established that Congress is prohibited from forcing its interpretation of that law upon the federal courts in a particular case, when the Court finds such a construction to lead to an unconstitutional result. The *Klein* Court held unconstitutional a reconstruction era statute which ordered the Court of Claims and the Supreme Court to dismiss for want of jurisdiction suits filed against the Government by presidentially pardoned former confederates who sought to obtain compensation for property abandoned to federal troops during the Civil War. *Id.* at 147. The Court stated: "Congress had inadvertently passed the limits which separate the legislative from the judicial power." *Id.*

vant only to the proposed limitation on the Court's power to order busing to achieve racial integration in schools. Legislation removing the Court's appellate jurisdiction concerning school prayer and abortion does not present any of the problems just described, since in each the Court's jurisdiction is presumably excised cleanly. However, legislation allowing the Supreme Court to continue to adjudicate cases alleging unconstitutional school segregation but removing from the Court power to employ the one remedy which the Court deems the most appropriate means of vindicating the fourteenth amendment right could be considered a direction to the Court as to how to decide a constitutional case.

This conclusion is far from clear, however. Though the doctrine of *United States v. Klein*<sup>103</sup> is well accepted, seemingly equally accepted is Congress' power to regulate the remedies which the federal judiciary may employ.<sup>104</sup> The busing limitation might well be viewed simply as an exercise of Congress' traditional power over remedies, while the Court's authority to determine the presence of a violation of the equal protection clause in a case of alleged school segregation is left intact. I believe, however, that the drawing of a distinction between the Court's authority to decide the substantive issue and its power to devise a remedy to rectify a constitutional violation is an artificial one. If judicial integrity is deemed to require that the Court be free from congressional influence over the decision of the merits of the substantive constitutional claim, the same logic requires that the Court be free to fashion the remedy it deems most appropriate. But whatever the logic, it is likely that, given the strong tradition of congressional power to regulate judicial remedies, such legislation would be upheld.

In any event, if Congress were truly bent on taking away the Court's power to order busing, it could accomplish its goal, even if a direct limitation on the busing remedy were found to violate separation of powers. For all Congress need do is to excise from the Court's appellate jurisdiction all cases alleging racial segregation in schools. If this were done, Congress would not be leaving the Court's jurisdiction intact with strings attached. Congress would simply be removing the Court's jurisdiction in toto.<sup>105</sup>

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103. See note 102 *supra*.

104. See, e.g., *Lauf v. E.G. Shinner & Co.*, 303 U.S. 323, 330 (1938). According to Professor Hart, "[i]t must be plain that Congress necessarily has a wide choice in the selection of remedies, and that a complaint about [the denial of] one remedy while another is left open, or the substitution of one for another, is very different." Hart, *supra* note 23, at 1366.

105. It should be noted that this discussion is not intended to alter my earlier conclusions regarding the equal protection problems resulting from a

## IV. THE IMPACT OF A WITHDRAWAL OF JURISDICTION

While Congress' power to restrict Supreme Court appellate jurisdiction is indeed broad, the limited impact of such a withdrawal should not be overlooked. Both proponents<sup>106</sup> and opponents<sup>107</sup> of the currently proposed legislation have overstated the consequences of such jurisdiction-curbing legislation.

Removal of Supreme Court appellate jurisdiction over an area of substantive law has no legal effect whatsoever on the validity of pre-existing Supreme Court decisions. Congress cannot, for example, overrule either *Roe v. Wade*<sup>108</sup> or *Engel v. Vitale*<sup>109</sup> by limiting the Court's appellate jurisdiction. Ironically, such congressional action would have the effect of locking in those decisions, for the only court that has power to modify, limit or overrule those decisions is the Supreme Court itself. Congress' power under the exceptions clause is unequivocally limited to curbing the Court's jurisdiction; neither that clause nor any other constitutional provision authorizes Congress to overturn Supreme Court decisions. The exercise of such an authority would represent a blatant violation of the concept of separation of powers. In *United States v. Klein*,<sup>110</sup> the Supreme Court made clear that Congress' power under the exceptions clause does not extend to the ability to direct the Court to act in a manner which the Court deems to be unconstitutional. Surely, then, that power does not extend to expressly rejecting constitutional holdings already issued by that Court.

Recently, however, it has on occasion been suggested that while Congress itself may not have authority to overturn Supreme Court decisions, once Congress removes the Court's appellate jurisdiction over a particular substantive area of law the state courts are somehow freed from any obligation to enforce the Court's previous holdings concerning that subject matter.<sup>111</sup> I fail to understand the

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limitation on judicial authority to employ busing in cases of racial school segregation. See text accompanying notes 80-87 *supra*. The focus of the discussion here is solely the separation-of-powers implications of such a limitation.

106. Rice, *supra* note 16, at 984-86.

107. Kay, *Limiting Federal Court Jurisdiction: The Unforeseen Impact on Courts and Congress*, 65 JUDICATURE 185, 188 (1981).

108. 410 U.S. 113 (1973) (recognizing a constitutional right to abortion).

109. 370 U.S. 421 (1962) (holding prayer in public schools unconstitutional).

110. 80 U.S. (13 Wall.) 128 (1871). For a discussion of *Klein*, see notes 102-04, *supra*.

111. See, e.g., Rice, *supra* note 16, at 985.

logic behind this assertion. As already noted, an exercise of congressional power under the exceptions clause does not legally affect previous Supreme Court holdings. Under the long-established principle of *Marbury v. Madison*,<sup>112</sup> the judicial branch in general, and the Supreme Court in particular, have final say as to the meaning of the Constitution. Under the supremacy clause, state courts are explicitly bound to enforce the Constitution. A combination of those two well-accepted principles demonstrates that, as long as Congress cannot overrule a Supreme Court decision, limitation of the Court's appellate jurisdiction in no way frees state courts from their unwavering obligation to enforce pre-existing constitutional holdings of the Supreme Court.

Of course, this discussion has been conducted on a purely theoretical level. As a practical matter, it is certainly conceivable that at least some state courts, freed from all federal policing, will practice what amounts to civil disobedience by blatantly ignoring their explicit obligation under the supremacy clause. As Professor Sager has suggested, in limiting Supreme Court jurisdiction Congress may be "aiming a lewd wink in the state courts' direction."<sup>113</sup> Unfortunately, the long-accepted role of the state courts as enforcers of federal law within our constitutional scheme,<sup>114</sup> as contemplated by both the Framers<sup>115</sup> and the modern-day Supreme Court,<sup>116</sup> effectively prevents consideration of this possibility—and that is, after all, all that it is—in deciding upon the constitutionality of congressional limitations on the Supreme Court's appellate jurisdiction. But I nevertheless believe it is unconscionable for academics to endorse or Congress to enact jurisdiction-curbing legislation on the assumption that the state courts, either furtively or openly, will thumb their noses at the now powerless Supreme Court. Such action could

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112. 5 U.S. (1 Cranch) 137 (1803).

113. Sager, *supra* note 50, at 47.

114. See Hart, *supra* note 23, at 1401. Professor Hart emphasized the importance of a strong, responsible state court system, stating that "[i]n the scheme of the Constitution [the state courts] are the primary guarantors of constitutional rights, and in many cases, they may be the ultimate ones. If they were to fail, . . . then we really would be sunk." *Id.*

115. See Redish & Woods, *supra* note 5, at 53-55.

116. See, e.g., *Steffel v. Thompson*, 415 U.S. 452 (1974). The *Steffel* Court noted the need to avoid the "unseemly failure to give effect to the principle that state courts have the solemn responsibility, equally with the federal courts 'to guard, enforce, and protect every right granted or secured by the Constitution of the United States.'" *Id.* at 460-61, quoting *Robb v. Connolly*, 111 U.S. 624, 637 (1884). This principle largely lies behind the doctrine of *Younger v. Harris*, 401 U.S. 37 (1971). See also *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 604 (1975).

significantly undermine the principles of federalism and, more importantly, of the rule of law itself. For how could the judiciary rightfully demand from society compliance with the law, if the courts themselves are guilty of blatant violation of the law?

## V. CONCLUSION

It is, in a certain sense, a hopeful sign that the limits—if any—on Congress' power to curb Supreme Court appellate jurisdiction remain unresolved. For this means the Congress has never risked a national crisis by imposing significant substantive limitations on the Court's authority. It will only be if and when we do face such a crisis that the judiciary will ultimately be called upon to answer the difficult constitutional questions that have been raised.

When the dust settles, it appears likely that Congress' power will prove to be very broad. As I have attempted to demonstrate, no significant internal limitation on Congress' authority can be found, and the reach of any external constitutional restraint is, at best, uncertain. While the equal protection requirement may provide some constraint, it is likely that at most, this limitation will affect Congress' power to restrict the Court's jurisdiction in regard to claims of racial equality.<sup>117</sup>

It is important, however, not to confuse issues of constitutionality with questions of propriety and wisdom. None of us can be certain exactly why the Framers inserted the terse wording of the exceptions clause into article III of the Constitution. But regardless of what they may have had in mind, it is now time for Congress to recognize that exercise of such a power, at least in anything more than the most innocuous housekeeping fashion, poses a serious threat to the modern carefully structured—if perhaps not entirely constitutionally-derived—balance of authority within the federal government.

The fear of an "imperial" Supreme Court, exercising its will to stifle widely-shared societal values, has ultimately never proven true. Either by means of the appointment process or simply through Supreme Court reflection, decisions which might be so characterized have, throughout our history, generally been modified or overruled.<sup>118</sup> Usually, the Court has managed to make such modifications without significantly undermining its role as the

117. See notes 85-87 and accompanying text *supra*.

118. See Ratner, *Majoritarian Constraints on Judicial Review: Congressional Control of Supreme Court Jurisdiction*, 27 VILL. L. REV. 929, 931-32 (1982).

primary independent protector of individual liberty against majoritarian pressures. Hence, without anyone entirely understanding all of the mechanics involved, the Supreme Court has been able to function as an effective and valuable partner in the governing process. I cannot believe that anything justifies congressional tampering with the delicate performance of this function.